

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DAVID GILBERT,

Plaintiff,

v.

SCHUSTER, FARMER, FURU, CHURCH,
HALEY, SHANNAHAN, ESCHBACH,
THOMPSON, McINTYRE,

Defendants.

CASE NO. C04-5345RJB

ORDER ADOPTING REPORT
AND RECOMMENDATIONS

This matter comes before the court on the Report and Recommendation of Judge Karen L. Strombom (Dkt. 49). The court has reviewed the Report and Recommendation and the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Gilbert, a prisoner at Stafford Creek Corrections Center, filed a civil rights complaint alleging that the defendants violated his First, Fourth, Eighth, and Fourteenth Amendment rights and violated the Americans with Disabilities Act. Dkt. 7 at 10.

The facts, viewed in the light most favorable to the plaintiff, are as follows: On January 24, 2003, the plaintiff was standing by the entryway to the weight room during the time when his unit was designated to use the Stafford Creek Corrections Center gym. Dkt. 32 at 4. He was avoiding the gym itself because it was excessively noisy. *Id.* Mr. Gilbert was then approached by Corrections Officer Schuetter and Recreational Specialist Farmer who told Mr. Gilbert to return to the gym area because he did not have the

1 requisite permit for being in the weight lifting area. Dkt. 32 at 4-5. Mr. Gilbert refused to go to the gym
2 and told the officers that the noise of the gym hurt his ears. He requested that he instead be permitted to go
3 back to his unit. *Id.* at 5. This request was denied, and Mr. Gilbert was searched. *Id.* Sergeant Church, an
4 unidentified sergeant, and two unidentified corrections officers responded to the scene. *Id.* Mr. Gilbert
5 requested to see the shift lieutenant, but the request was denied. *Id.* at 6. He was handcuffed and escorted
6 to an area outside the back of the gym facility. *Id.* at 6. Once outside, Mr. Gilbert again requested the shift
7 lieutenant, but the request was denied. *Id.* at 6. Mr. Gilbert contends that excessive force was used in
8 escorting him and that he was shoved against the wall. *Id.* He contends that this incident aggravated pre-
9 existing injuries to his back and clavicle and chipped his glasses. *Id.*

10 The plaintiff was infracted for refusal to proceed or disperse from a particular area and found guilty
11 by Lieutenant Haley. Dkt. 45, Exh. 4. The original sanction was 40 days loss of good conduct time, with
12 20 of those days suspended, and 10 days of disciplinary segregation. *Id.* Mr. Gilbert contends that he was
13 verbally assaulted, slandered, and intimidated by Lieutenant Haley during the hearing and that the sanction
14 was excessive. Dkt. 32 at 7. Specifically, Mr. Gilbert contends that Lieutenant Haley called him “garbage”
15 for being a Vietnam war veteran. Dkt. 46 at 12. He also contends that he was denied witnesses. Dkt. 46 at
16 10, 13 (“I was not allowed access to witness’ [sic] because I did not adequately know their names due to
17 my recent arrival at Stafford Creek.”). On appeal, all of the loss of good conduct time was suspended, but
18 the plaintiff still served 10 days of confinement in IMU. Dkt. 45, Exh. 1 at 6.

19 When he was released from segregation on February 6, 2003, the plaintiff sought medical care for
20 ear pain. Dkt. 32 at 8. Mr. Gilbert contends that defendant Eschbach provided him substandard medical
21 care by administering an ear test with excessive force. Dkt. 32 at 8. Mr. Gilbert was instructed to wait in
22 the waiting room and was then verbally threatened with confinement by Sergeant Church. *Id.* at 9. Mr.
23 Gilbert contends that he attempted to file grievances but that defendants Shannahan and McIntyre tore up
24 and refused to consider his grievances. Dkt. 32 at 7-8, 14.

25 Finally, Mr. Gilbert contends that he has suffered retaliation for filing this suit. Namely, he contends
26 that his cell was searched for the purpose of locating and reading documents relating to this suit, that he
27 lost his work position and wages, and that he was harassed. Dkt. 46 at 11.

28 II. DISCUSSION

A. FIRST AND FOURTH AMENDMENTS

Mr. Gilbert has not presented the court with any facts supporting his claim that his rights under the First and Fourth Amendments were violated. The motion for summary judgment should be granted with respect to these claims.

B. EIGHTH AMENDMENT**1. Medical Claims**

The plaintiff contends that defendants Eschbach and Thompson denied him treatment for his hearing condition. Dkt. 32 at 9. He does not contend that he was denied treatment altogether but that he was only partially treated. *Id.* at 8 (“denied medical treatment in part”), 9 (“No further treatment was required.”). As set forth in the Report and Recommendation, Mr. Gilbert’s claim amounts to a disagreement with Eschbach and Thompson’s conclusion that he did not require further treatment and is therefore an insufficient basis for his claim.

2. Excessive Force

Mr. Gilbert contends that he was pushed up against the wall with a degree of force that broke his glasses and aggravated his pre-existing back and clavicle injuries. Dkt. 32 at 6. His deposition testimony that he suffered nothing more than discomfort coupled with his failure to seek medical attention demonstrate that his injuries, if any, were *de minimis*. Dkt. 45, Exh. 6 at 44. *See Oliver v. Keller*, 289 F.3d 623, 629 (9th Cir. 2002) (injuries *de minimis* where plaintiff testified that his injuries were not serious and did not seek medical care). The court should adopt the Report and Recommendation with respect to this claim.

C. FOURTEENTH AMENDMENT

As explained by the Report and Recommendations, the defendants are entitled to summary judgment on the claim that they infringed upon Mr. Gilbert’s due process rights because Mr. Gilbert’s claim is unsupported by a liberty interest. Mr. Gilbert contends he was deprived of liberty without due process of law when he was sanctioned with 10 days of segregated confinement and his grievances were ignored or torn up. Segregated confinement does not violate a liberty interest for purposes of due process. *See Sandin v. Connor*, 515 U.S. 472, 558 (1995). Furthermore, there is no due process property right in prison grievance procedures. *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). Even if the state

1 provides such grievance procedures, there is no constitutional cause of action for violation of those
2 procedures. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (No liability for refusing to allow
3 prisoner to examine adverse witnesses or for adding things to prisoner's appeal to mask procedural errors
4 in disciplinary hearing.). The Report and Recommendation should therefore be adopted with respect to this
5 claim.

6 **D. AMERICANS WITH DISABILITIES CLAIM**

7 Mr. Gilbert contends that Officer Schuetter and Recreational Specialist Farmer violated his rights
8 under the Americans with Disabilities Act by ordering him to return to the noisy gym even though he had
9 alerted them that the excessive noise was painful to him. Dkt. 32 at 5. Violations of the Americans with
10 Disabilities Act cannot be brought under 42 U.S.C. § 1983. *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th
11 Cir. 2002).

12 **E. RETALIATION CLAIM**

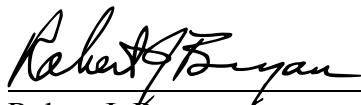
13 Mr. Gilbert alleges that he has been retaliated against for filing this action. This claim was not
14 included in the original complaint and is not properly before the court.

15 **III. ORDER**

16 Therefore is hereby **ORDERED** that the Report and Recommendation of Magistrate Judge Karen
17 L. Strombom is **ADOPTED**. The Defendants' Motion for Summary Judgment (Dkt. 45) is **GRANTED**,
18 and the case is **DISMISSED**.

19 The Clerk is directed to send copies of this Order to plaintiff's counsel, defendant's counsel and
20 Magistrate Judge J. Kelley Arnold.

21 DATED this 19th day of December, 2005.

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24 Robert J. Bryan
25 United States District Judge
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